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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1063

CHARLES WRIGHT, JIMMY CARTER, RUFUS HOOKS, ESTELLE JOHNSON and FRANCIS SPIRES,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(On Petition for Writ of Certiorari To The Illinois Supreme Court)

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Illinois Supreme Court is reported at 41 Ill. 2d 170, 242 N.E. 2d 180 (1968).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED FOR REVIEW

Whether a police officer who observes a crime being committed in his presence has probable cause to make an arrest without a warrant?

Whether the "plain view" doctrine has continuing vitality?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to The Constitution of The United States.

STATUTE INVOLVED

Illinois Revised Statutes, Chapter 38, Section 121-3 (1965).

STATEMENT OF THE CASE

On May 12, 1966 the petitioners were convicted of Gambling, a violation of *Illinois Revised Statutes*, Ch. 38, sec. 28-1 (1965). The sole witness for the state, both at the hearing on the Motion to Suppress and at trial, was officer Herman Waller, a Chicago policeman. He testified at the hearing on the Motion to Suppress that on November 24, 1965, he had occasion to get a search warrant for a second floor apartment in Chicago. A part of the original information given him regarding a policy operation at that address included the names of people who were engaged in this activity.

Officer Waller obtained the warrant at 7:00 P.M. on that night. He and several other police officers went to

the premises in question and arrived at about 9:30 P. M. Upon arrival he set up a surveillance of the premises because he knew that no one would be in the apartment until 10:00 or 10:30 P. M. During the time that the officers observed the building (about 35 minutes), people officer Waller knew to be engaged in policy operations did in fact enter the building. Officer Waller knew that these individuals worked in policy because he had previously arrested some of them on policy charges and because of the specific information he had received about policy operations at the address in question.

The individuals recognized by the witness went, not to the second floor apartment as they had done in the past, but to the first floor apartment. After seeing this, Officer Waller went to the rear of the premises. Because this building did not have a backyard, he was able to stand under the elevated tracks on the Chicago Transit Authority right-of-way and look through the window of the first floor apartment. He was standing one to three feet from the window the sill of which was waist level. The window was closed at the time but there was no storm window. According to the witness' testimony he could see the heads of the people in the room and he heard a female voice saying, "are all your books in", "who has any short books", and "where is all the money?" In addition he heard the operation of an adding machine.

From his experience gained in three to four hundred policy arrests, Officer Waller knew that "short books" means that a "runner" is short on money, that he hasn't obtained enough cash to clear his bets on that book. Also, he testified that adding machines are used in policy operations to tally the sums that are collected daily on each book.

At this point the witness alerted his men that he was going to make an entry. He went to the front door and knocked, whereupon a male known as Thomas Jefferson came to the door pulled back the curtain, and asked, "Who is it?" The witness announced his office, but Jefferson told him to "get lost". Officer Waller then forced the door open and entered into the first floor apartment. The search warrant for the second floor apartment was never executed and was later quashed.

On the basis of this testimony the Motion to Suppress was denied. It was concluded that the police officer had reasonable grounds to believe that an offense had been committed in the first floor apartment because of what he had seen and heard and that the entry into the premises for the purpose of making an arrest was, therefore, legal.

REASONS FOR DENYING THE WRIT

I.

The Instant Search Was Incident To A Valid Arrest Based On Probable Cause And Was Consistent With The Decisions Of This Court.

The petitioners contend that the evidence obtained incident to their arrest should have been suppressed because the conduct of the police violated the Fourth Amendment as interpreted by this Court. They argue that the resolution of this issue by the Illinois Supreme Court conflicts with particular decisions of this Court. However, putting these cases into their proper context it is clear that the Illinois Supreme Court properly applied the law.

Viewing the conduct of Officer Waller step-by-step, the Illinois Supreme Court made the following relevant findings:

a) His looking through the window did not constitute an unreasonable search.

b) From what he observed and what he knew from prior experience he had probable cause to make an arrest without a warrant.

c) His announced entry was proper police conduct.

d) And finally, the arrest he made being valid, the search and seizure was justified without the necessity of first obtaining a warrant.

It is apparent that the gravamen of the petition is that it was improper for Officer Waller to take his position on the property of the Chicago Transit Authority and look into the window of the petitioners' apartment. The Illinois Court was following a rule well established by this Court and others that to observe what is in plain view is not a search. *United States* v. *Lee,* 274 U.S. 559 (1926); *Fullbright* v. *United States,* 392 F. 2d 432 (10th Cir. 1968); *Edwards* v. *State,* 156 N.W. 2d 397 (Wisc. 1968); *Penna* v. *State,* 241 A. 2d 385 (Conn. 1967); *Minnick* v. *State,* 241 A. 2d 153 (Md. App. 1968). And, as the court observed, this doctrine is not limited to what is seen. It has been applied to the five senses. *Walker* v. *State,* 270 P. 2d 1107 (Okla. Crim. App. 1954).

The Illinois Supreme Court quoted *Harris* v. *United States,* 390 U.S. 234 (1968) as reaffirming the "plain view" doctrine. In point of time *Harris* follows *Katz* v. *United States,* 389 U.S. 347 (1967), where this Court was careful to point out that the "Fourth Amendment protects people not places. What a person knowingly exposes to

the public even in his own home or office is not a subject of fourth amendment protection." 389 U.S. at 351.

The petitioners object to the manner in which the Illinois Court distinguished *Katz*. However, the difference between the conduct of Officer Waller and the use of electronic eavesdropping devices is a distinction which goes to the very heart of the *Katz* decision and hardly needs comment. In its opinion the Illinois Supreme Court reconciled *Harris* and *Katz* in the following way:

> We read the reaffirmation of the lawful position aspect of the plain-view doctrine in *Harris* as retaining the viability of the trespass doctrine in those cases where law enforcement officers gain information concerning crimes by use of their natural senses. Therefore, while the absence of a trespass is no longer to be an adequate ground to justify the admission of evidence secured through use of the natural senses assisted by artificial means, the lack of a trespass is still a highly relevant consideration in sustaining the admission of evidence which has fallen into the plain view of an officer, i.e., gathered solely by the use of his natural senses.
>
> We have here a law enforcement officer using his senses of vision and hearing to discover what is occurring inside a private residence. In three Federal cases (Brock v. United States (5th Cir.), 223 F. 2d 681; California v. Hurst (9th Cir.), 325 F.2d 891; Texas v. Gonzales (5th Cir.), 388 F.2d 145) it was held that evidence procured by officers standing on the *defendants' premises* and peering into their windows constituted a search in violation of the defendants' fourth amendment "right to be let alone." This differs from those on the physical facts because here the police officer watched and listened through the rear window of the first floor apartment while standing on public property, a C.T.A. right-of-way where he had a right to be, rather than trespassing on defendants'

> property; and the absence of a trespass under our reading of *Harris* is of major if not decisive importance in cases involving the plain-view doctrine. 242 N.E. 2d at 183-184

Another point of departure between *Katz* and the instant case is that what Officer Waller heard was not introduced into evidence. It was used only to establish probable cause and not as evidence in the case in chief. Officer Waller having heard the conversation going on between the suspects, knowing what they were doing and talking about by reason of his experience as a police officer, decided to make his entry and effect an arrest. It is clear that according to standards laid down by this Court Officer Waller had probable cause:

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.
>
> "The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt." *McCarthy* v. *De Armit,* 99 Pa. St. 63, 69, quoted with approval in the *Carroll* opinion. 267 U.S. at 161. And this "means less than evidence which would justify condemnation" or conviction, as Marshall, C. J., said for the Court more than a century ago in *Locke* v. *United States,* 7 Cranch 339, 348. Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. *Carroll* v. *United States,* 267 U. S. 132, 162.

> These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.
>
> *Brinegar* v. *United States,* 338 U.S. 160 at 175-176.

See also: *Draper* v. *United States,* 358 U.S. 307 (1959); *Miller* v. *United States,* 357 U.S. 301 (1958).

The petitioner contends that the circumstances were not exigent. However nothing could be further from the truth. It was late at night and the suspects were finishing their illegal work for the day. They were not going to remain around the premises much longer and, as this court observed in *Schmerber* v. *California,* 384 U.S. 757 (1966):

> "Although the facts . . . established probable cause to arrest in this case . . ., the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test. . . . The officer in the present case . . . might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of

> evidence', *Preston* v. *United States,* 376 U.S. 364, 367."
>
> 384 U.S. at 770.

The principle reaffirmed in *Schmerber* is beyond dispute. It has been applied repeatedly by this Court and courts of the several states. *Henry* v. *United States,* 361 U.S. 98 (1959); *Draper* v. *United States,* 358 U.S. 307 (1959); *Rabinowitz* v. *United States,* 339 U.S. 56 (1947); *Lee* v. *United States,* 363 F. 2d 469 (8th Cir. 1966); *United States* v. *McMillan,* 368 F. 2d 810 (2nd Cir. 1966); *Rocha* v. *United States,* 387 F. 2d 1019 (9th Cir. 1967); *United States* v. *Clark,* 289 F. Supp. 610 (E.D.Pa. 1968).

Thus, having probable cause and there being sound reason for not first obtaining a search warrant, Officer Waller made his move to enter the building. A comparison of *Ker* v. *California,* 374 U.S. 23 (1962), with the case at bar demonstrates the propriety of this conduct. In *Ker* this Court noted:

> The *evidence at issue, in order to be admissible, must* be the *product of a search incident to a lawful arrest, since* the *officers had no search warrant.* The lawfulness of the arrest without warrant, in turn, must be based upon probable cause, which exists "where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar* v. *United States,* 338 U.S. 160, 175-176 (1949), quoting from *Carroll* v. *United States,* 267 U.S. 132, 162 (1925); accord, *People* v. *Fischer,* 49 Cal. 2d 442, 317 P. 2d 967 (1957); *Bompensiero* v. *Superior Court,* 44 Cal. 2d 178, 281 P. 2d 250 (1955).
>
> 374 U.S. at 34-35.

In the instant case the probable cause was based on much stronger evidence than that present in *Ker*. Here officer Waller had the rare opportunity of viewing and hearing the suspects in the furtherance of the crime. The police in *Ker* lacked this opportunity. Waller was not, as the petitioners suggest, relying on mere suspicion; thus, there was no transgression of the guidelines recently defined in *Spinelli* v. *United States,* —— U.S. ——, 4 Cr.L. Rptr. 3083 (1969).

The petitioners contend that this analysis conflicts with *Johnson* v. *United States,* 333 U.S. 10 (1947); *McDonald* v. *United States,* 335 U.S. 451 (1948); and *Chapman* v. *United States,* 365 U.S. 610 (1955). Petitioners argue that the holdings in these cases would have required the police to first obtain a warrant. However, in arriving at this conclusion petitioners fail to give proper consideration to *Trupiano* v. *United States,* 334 U.S. 699 (1948); *Rabinowitz* v. *United States,* 339 U.S. 56 (1947); and *Ker* v. *California,* 374 U.S. 23 (1962).

In point of time the first of these decisions was *Johnson.* It was specifically followed in *Trupiano. McDonald* followed and relied on both *Johnson* and *Trupiano.* If it were not for *Rabinowitz* there might be conflict between the holding of the Illinois Supreme Court and these cases. However, in *Rabinowitz* this Court made the following observation:

> "To the extent the *Trupiano* requires a search warrant solely upon the basis of the practicality of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled." 339 U.S. at 66.

It follows logically, then, that since *Trupiano* followed *Johnson,* and *McDonald* specifically relied on both, they

have all been overruled to the same extent by *Rabinowitz.* Thus, there is no confusion or conflict in the holdings.

The petitioner makes the observation that *Johnson* was followed in *Chapman* v. *United States,* 365 U.S. 610 (1955), which was decided after *Rabinowitz.* However, *Ker* v. *California,* 374 U.S. 23, 35, specifically followed *Rabinowitz;* and that negates the influence of *Johnson* and *Chapman* insofar as a warrantless search incident to an arrest is concerned. See *Ker* v. *California,* 374 U.S. at 42-43, n. 13 & 14. Furthermore, in *Ker* this Court specifically distinguished *Chapman* on its facts from a situation like the one at bar. In *Chapman* the police entered a home without a warrant because they smelled burning opium emanating from the room. But in that case there was no question of a search incident to an arrest. The defendant was not even home when the police entered his house with the landlord's permission. This Court in *Ker* made the observation that:

> In cases in which a search could not be regarded as incident to arrest because the petitioner was not present at the time of the entry and search, the absence of compelling circumstances, such as the threat of destruction of evidence, supported the Court's holdings that searches without warrants were unconstitutional. See *Chapman* v. *United States,* 365 U. S. 610, 615 (1961); *United States* v. *Jeffers* 342 U.S. 48, 52 (1951); *Taylor* v. *United States,* 286 U.S. 1, 5 (1932). 374 U.S. at 42, n. 13.

Thus, the apparent conflict results from petitioners' failure to consider all the relevant cases on the issue they have raised.

II.

A Brief Delay In The Execution Of A Search Warrant Does Not Vitiate The Subsequent Search And Seizure.

The petitioners complain that there was approximately a three hour delay between the time the search warrant was obtained and the time it was abandoned. They contend that this conduct by the police vitiated the subsequent arrest and search.

The search warrant was issued in compliance with Illinois Revised Statute, Chapter 38, sec. 108-6 (1967). According to this statute the police had 96 hours to execute the warrant. It is worth noting that this provision follows the language of the Federal Criminal Rule 41(d) which, significantly, provides for a ten day period in which to execute a warrant.

Be that as it may, there was good reason for officer Waller not executing the search warrant immediately. He knew that no one would be in the apartment until 10:00 or 10:30 P.M. His actions were nothing less than good police work.

The petitioners assert that the Illinois Supreme Court did not concern itself with the fact that the search warrant was not executed and that the surveillance of the premises resulted in probable cause for an arrest. They apparently overlooked that portion of the Court's opinion which stated:

> "It is of no consequence that the search warrant obtained by police was quashed because it authorized a search only of the second floor apartment of the two-story building, since defects in a search warrant are immaterial if the search can be otherwise justified." 242 N.E. 2d at 182.

Here, as demonstrated above, the search was justified as being incident to a lawful arrest. Defects in an existing warrant or, for that matter, absence of a warrant altogether, under the circumstances presented here, are irrelevant factors. *Ford* v. *United States,* 352 F. 2d 927 (D.C.Cir. 1966); *United States* v. *Hall,* 348 F. 2d 837 (2nd Cir. 1965); *Ferganchick* v. *United States,* 374 F. 2d 559 (9th Cir. 1967); *State* v. *Allen,* 232 A. 2d 315 (Pa. 1967); *People* v. *Chimel,* 61 Cal. Rptr. 714 (Cal App. 1967).

The petitioner's reliance on *Bumper* v. *North Carolina,* 391 U.S. 548 (1968), is misplaced. The search here was neither conducted in reliance on an invalid warrant nor on the basis of coerced consent.

CONCLUSION

For the foregoing reasons it is respectfully requested that the Petition for Writ of Certiorari to The Illinois Supreme Court be denied.

Respectfully submitted,

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